No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In this *Bivens* action against a public official, the court of appeals affirmed the district court's denial of summary judgment sought by the defendant on the ground of qualified immunity from liability in damages. The questions presented are:

1. Whether the district court's denial of summary judgment on qualified immunity grounds is an immediately appealable collateral order when the defendant is also named in the complaint in a prayer for injunctive relief.

2. Whether, in determining what proof is required in order to resist a grant of summary judgment in such a case, the court of appeals erred in relaxing, in favor of the plaintiff, the requirements of Fed. R. Civ. P. 56.

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The Solicitor General, on behalf of Lynn Jay Ferrin, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 889 F.2d 922. The amended opinion and order of the court of appeals on the denial of rehearing (App., *infra*, 16a-19a) is reported at 906 F.2d 465. The opinion of the district court (App., *infra*, 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1989. A rehearing petition was denied on June 25, 1990. App., *infra*, 19a. On September 13, 1990, Justice O'Connor extended the time for

filing a certiorari petition to and including October 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 56, Fed. R. Civ. P., provides in part as follows:

> **(c) Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
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> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or de-

nials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT

1. Petitioner is a Special Agent of the Federal Bureau of Investigation. Beginning in 1980, petitioner was assigned to an investigation of alleged criminal activities at various Las Vegas, Nevada, gambling casinos, one of which was the Stardust Hotel and Casino. During the investigation, respondent testified before a federal grand jury and denied knowledge of any illegal activities at the Stardust. In January 1984, the Stardust and five employees were indicted for "skimming" money from the hotel and casino, *i.e.*, for underreporting or not reporting cash receipts in order to evade tax liability.[1] The dispute between the parties stems from two subsequent events that occurred in November 1984.

At that time, respondent was employed as a card dealer at the Sands Hotel and Casino. On about No-

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[1] See Second Amended Compl. paras. 2, 6-8 (Apr. 7, 1987).

vember 19, petitioner contacted respondent during his working hours at the Sands. Petitioner asked respondent for his assistance in the upcoming Stardust trial. After respondent denied having any knowledge of illegal activities at the Stardust, petitioner said that, given respondent's association and friendship with the individual defendants in the Stardust case, he believed that respondent could assist the government if respondent wanted to do so. Respondent again denied having any knowledge of illegal activities at the Stardust. After respondent uttered his second denial, petitioner ended the interview.[2] In his complaint in this action, respondent alleges that during this interview, petitioner attempted to coerce him into committing perjury in the Stardust case.[3]

The second incident occurred not long thereafter. The parties agree that petitioner spoke with Doug Ducharme, the Sands casino manager, and that the Sands fired respondent. In his complaint, respondent alleged, on information and belief, that petitioner "directed and demanded" that the Sands fire respondent because of his association with the Stardust and its employees and his "refusal to 'assist' " the government in the Stardust case.[4]

2. Respondent thereafter brought this *Bivens* action[5] against petitioner. Respondent alleged that petitioner had attempted to coerce him into committing perjury in the Stardust case, and that petitioner had

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[2] See Second Amended Compl. para. 9.

[3] See Second Amended Compl. paras. 10, 15.

[4] Second Amended Compl. para. 10.

[5] See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

coerced the Sands into dismissing him, in violation of, inter alia, the Fifth Amendment. Complaint paras. 6-16 (Jan. 2, 1985). Respondent also filed three broad discovery requests: a request for admissions; a set of interrogatories; and a request for the production of all documents in the FBI's investigative file relating to respondent, seven other specified persons (including the five individual defendants named in the Stardust indictment), and the investigation at the Stardust. During the ensuing two years, the parties filed various pretrial motions before the case approached the summary judgment stage.[6]

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[6] There was a fair degree of maneuvering, which can be summarized as follows:

(1) Petitioner moved to dismiss the complaint and sought a protective order. In connection with the motion for a protective order, petitioner argued that discovery was unnecessary until the pending motion to dismiss had been resolved. Motion for a Protective Order 2 (May 2, 1985). Relying on a local court rule, the magistrate granted petitioner's request on the ground that respondent had not opposed it. *Di Martini* v. *Ferrin*, No. CV LV 85-001, LDG (May 28, 1985) (Magistrate Pro; minute entry). Respondent then moved in the district court to have the protective order vacated. He argued that he had not opposed petitioner's earlier request for a protective order because he had entered into a stipulation with petitioner to extend the time to comply with his discovery request. Motion to Set Aside Protective Order 2 (June 12, 1985). See C.A. R.E. 26 (docket sheet noting stipulations). Respondent agreed that discovery could be stayed pending resolution of petitioner's motion to dismiss, but also argued that "[i]t is important for [respondent], at this time, to pursue the discovery with respect to the basis upon which [respondent's] former employer, the Sands Hotel & Casino, Las Vegas, Nevada, terminated him from his employment." Motion to Set Aside Protective Order 2.

The district court did not then act on respondent's motion to vacate the protective order. Instead, the district court dis-

Respondent ultimately filed a second amended complaint[7] and noticed petitioner's deposition. Peti-

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missed the complaint. The court held that respondent had not served the Attorney General and also that petitioner was entitled to absolute immunity from damages liability on respondent's state law tort claims. *Di Martini* v. *Ferrin*, No. CV LV 85-001, LDG (Aug. 15, 1985), slip op. 1-2.

(2) Respondent thereafter sought leave to file an amended complaint. The district court granted respondent's motion, C.A. R.E. 27 (docket sheet), and petitioner moved to dismiss the amended complaint. Before the district court ruled on petitioner's motion, respondent again moved in district court to vacate the protective order. Motion to Set Aside Protective Order (Oct. 9, 1986). Respondent argued (*id.* at 2-3 (citation omitted)):

> Unlike the first Motion to Dismiss[,] which was based on insufficiency of process and immunity from state law causes of action, the pending Motion to Dismiss attacks the Plaintiff's alleged failure to state specific facts to support his claims of deprivation of constitutional rights. Thus, discovery directly bears on the determination of this Motion. Once Plaintiff's discovery requests are complied with by the Defendant, Plaintiff will have in his possession the relevant facts necessary to plead his constitutional deprivations with sufficient specificity should the Court decide that Plaintiff's complaint is not properly supported by factual data.

The district court later denied petitioner's renewed motion to dismiss, ruling that the facts alleged in petitioner's amended complaint, if proved, could establish a violation of respondent's due process rights. *Di Martini* v. *Ferrin*, No. CV-S-85-001, LDG (Oct. 22, 1986). The court also vacated the protective order due to petitioner's failure to oppose respondent's most recent motion to set aside the protective order. *Di Martini* v. *Ferrin*, No. CV-S-85-001-LDG (Mar. 26, 1987); C.A. R.E. 28 (docket sheet).

[7] The factual allegations in the Second Amended Complaint were essentially the same as those in the original complaint,

tioner moved for summary judgment on qualified immunity grounds, and filed his own affidavit in support of the motion. In this affidavit, petitioner denied making any attempt to coerce respondent into committing perjury in the Stardust case, denied asking Ducharme or anyone else at the Sands (or the Stardust) to fire respondent, and denied threatening anyone not to hire respondent.[8] Petitioner also sought a protective order on the ground that discovery should not be permitted until the district court had resolved the qualified immunity question. Motion for Protective Order 3 (May 27, 1987) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)).

Respondent opposed both motions. In an affidavit filed with his opposition to the summary judgment motion,[9] respondent repeated the claims of his complaint. As the court of appeals acknowledged, however, the affidavit contained no support for the allegations of the complaint that petitioner had attempted to coerce respondent into committing perjury, and contained no admissible evidence to show that petitioner had coerced respondent's employer

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see Compl. paras. 6-16 (Jan. 2, 1985), and in the first amended complaint, see First Amended Compl. paras. 6-16 (Jan. 14, 1986). In the Second Amended Complaint, however, respondent abandoned his state law tort claims and added the allegation that petitioner had interfered with his ability to pursue his profession, in violation of the Fifth Amendment Due Process Clause. Motion for Leave to Amend Complaint 2-3 (dated Nov. 5, 1985).

[8] Decl. of Special Agent Lynn Jay Ferrin paras. 8-10 (May 18, 1987) (Ferrin Decl.).

[9] Decl. of Herman Louis Di Martini (June 26, 1987) (Di Martini Decl.).

into firing him. App., *infra*, 11a. In opposing the motion for a protective order, respondent relied solely on the "Points and Authorities attached to [his] Opposition" to petitioner's summary judgment motion, in which respondent argued against qualified immunity as a matter of law. Opposition to Defendant's Motion for Protective Order (July 6, 1987). Respondent made no argument that he could not present by affidavit facts essential to justify his opposition, or that he should be permitted to engage in discovery in order to defend against the summary judgment motion, ~~and,~~ In particular, he filed no affidavit to that effect under Rule 56(f) of the Federal Rules of Civil Procedure.

The district court entered a protective order staying discovery, *Di Martini* v. *Ferrin*, No CV-S-85-001, LDG (July 30, 1987), and denied petitioner's motion for summary judgment, App., *infra*, 20a-21a. The court reasoned that the right to be free from government misconduct was "clearly established" at the time of petitioner's actions in 1984 because *Davis* v. *Passman*, 442 U.S. 228 (1979), had upheld a *Bivens* action for Fifth Amendment violations. App., *infra*, 21a.

3. Petitioner appealed, and the court of appeals affirmed, albeit on different grounds. App., *infra*, 1a-15a. At the outset, the court held that an order denying a claim of qualified immunity from damages liability is an immediately appealable collateral order even if the defendant is also named in a prayer for injunctive relief. App., *infra*, 4a-7a. The Ninth Circuit rejected the Third Circuit's contrary holding in *Prisco* v. *United States*, 851 F.2d 93 (1988), cert. denied, 109 S. Ct. 2428 (1989), that such orders are not immediately appealable, and followed the deci-

sions handed down by seven other circuits. App., *infra*, 4a.

Before addressing the merits of the qualified immunity issue, the court discussed "the role of affidavits in qualified immunity cases." App., *infra*, 9a-10a. The Ninth Circuit described that role as follows, *id.* at 10a:

> Because the Supreme Court has barred discovery until after the trial judge can answer the legal question whether the alleged acts constitute a constitutional violation that was clearly established at the time, a plaintiff may often have no way to defend against a summary judgment motion other than through his own affidavit. In order to survive the motion, the plaintiff must set forth facts sufficient to raise the constitutional question. However, he cannot depose the percipient witnesses who could testify to those facts, and he may not himself have directly observed all of the critical events.
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> This dilemma requires some relaxation of the ordinary rules of admissibility in the case of affidavits used to oppose qualified immunity motions. For example, since plaintiffs cannot compel testimony from others when opposing such motions, they must be allowed to rely on what those witnesses have told them, i.e. hearsay. Similarly, plaintiffs may not be able to obtain documents in the possession of others, and may be compelled, instead, to set forth their understanding of the contents of those documents in their own affidavits. Thus, the best evidence rule cannot always be strictly enforced. Also, a greater tolerance of speculation and inference must be afforded. At a later stage in the proceedings plaintiff will, of course, be required to establish the facts by more traditional means.

> However, where the issue to be resolved on summary judgment is solely whether the law was clearly established at a particular time, and compelled testimony regarding the operative facts is precluded, a plaintiff must be permitted to set forth his understanding of the facts whether or not his knowledge is first-hand or meets all the ordinary rules of evidence.

Using that approach in this case, the court of appeals held that the affidavits created a genuine issue of material fact on the questions whether petitioner "intimidated" respondent into cooperating with petitioner and whether petitioner was responsible for respondent's dismissal. App., *infra*, 11a. The court acknowledged that respondent's affidavit did not, and could not, attest to any coercion of his employer by petitioner, since respondent had no personal knowledge of any such coercion. But referring to respondent's report of his conversation with his supervisor—a report that could not constitute evidence of the truth of the supervisor's statements—the court said that "[a] rational trier of fact could infer from [respondent's] alleged conversation with his employer that [petitioner] in fact demanded [respondent's] discharge." *Ibid.* The court also held that, although respondent's affidavit "contained no support" for his allegation that petitioner attempted to coerce respondent into committing perjury in the Stardust case, respondent's affidavit did allege facts from which he "apparently inferred an intent to get him to testify 'or else.'" *Ibid.* The court excused any shortcomings in that affidavit on the ground that the district court had stayed all discovery pending disposition of the qualified immunity motion. *Id.* at 11a n.1.[10]

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[10] At the same time, the court of appeals found no support for respondent's allegation that petitioner had deprived him

On the merits of the qualified immunity issue, the court held that respondent had stated a violation of a clearly established due process right to be free from arbitrary government interference in private employment. App., *infra*, 12a-15a.

4. Petitioner filed a petition for rehearing with a suggestion of rehearing en banc. The court issued an order revising its discussion of the merits of the qualified immunity issue,[11] but did not modify its discussion of the role of affidavits in qualified immunity cases. App., *infra*, 17a-19a.

REASONS FOR GRANTING THE PETITION

In *Butz* v. *Economou*, 438 U.S. 478 (1978), and *Harlow* v. *Fitzgerald*, *supra*, this Court held that Executive Branch officials are generally entitled only to qualified, not absolute, immunity, when they are sued in *Bivens* actions for constitutional torts. At the same time, this Court assumed that federal officials would not needlessly suffer the burdens of litigation since the lower federal courts would be able to dispose of insubstantial cases by strictly applying the Federal Rules of Civil Procedure, including the rules of summary judgment. In this case, however, the Ninth Circuit has upset that balance. The Ninth Circuit held that "some relaxation" of the rules governing summary judgment is necessary in such cases precisely *because* they are *Bivens* action. In so do-

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of the opportunity to obtain other employment in the casino industry. "On summary judgment, a plaintiff is not entitled to survive on vague assumptions about informal communications within an industry." App., *infra*, 11a.

[11] Although we disagree with the analysis of that issue by the court below and with its conclusion, we do not challenge that ruling in this petition.

ing, that court endorsed an entirely novel approach to the adjudication of summary judgment motions involving qualified immunity claims and unjustifiably exposed federal officials to the risks and burden of litigation. Because the decision below threatens to nullify key protections afforded public officials by that doctrine, and because the Ninth Circuit's decision is inconsistent with decisions of this Court and other courts of appeals, review by this Court is warranted.

1. This case also involves an important threshold question of appellate jurisdiction as to which there is a conflict among the circuits. In our view, the Ninth Circuit correctly held that the district court's order is immediately appealable.

a. *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), held that an order denying a government official's claim of qualified immunity from a damages suit is an immediately appealable collateral order. *Forsyth* reasoned that the qualified immunity recognized by *Harlow* v. *Fitzgerald*, *supra*, is not merely a defense to liability but is an "entitlement" to "an *immunity from suit*" and thus "is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526. *Forsyth* also noted that "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-528. Erroneously forcing a government official to stand trial, or even to undergo pretrial discovery, *Forsyth* stressed, would defeat the important policies served by qualified immunity, *i.e.*, avoiding the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of

able people from public service." *Id.* at 526 (quoting *Harlow*, 457 U.S. at 816).

Forsyth left open the question whether a public official can immediately appeal an order denying a claim of qualified immunity when the plaintiff has sought injunctive relief as well as damages. 472 U.S. at 519 n.5. Since then, nine courts of appeals, including the one below, have considered that question, and eight have expressly held that such an order is immediately appealable even though the case will go forward on the plaintiff's request for injunctive relief regardless of the resolution of the immunity issue. *De Abadia* v. *Izquierdo Mora*, 792 F.2d 1187, 1189-1190 (1st Cir. 1986); *Kennedy* v. *City of Cleveland*, 797 F.2d 297, 305-306 (6th Cir. 1986), cert. denied, 479 U.S. 1103 (1987); *Scott* v. *Lacy*, 811 F.2d 1153, 1153-1154 (7th Cir. 1987); *Drake* v. *Scott*, 812 F.2d 395, 398, supplemented on rehearing, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987); *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 717-718 (10th Cir. 1988); *Young* v. *Lynch*, 846 F.2d 960, 961-963 (4th Cir. 1988);[12] *Marx* v. *Gumbinner*, 855 F.2d 783, 786-788 (11th Cir. 1988).[13] In addition, the Ninth Circuit in this

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[12] In *Young* v. *Lynch*, the Fourth Circuit, relying on *Forsyth*, overruled its earlier decisions holding that a defendant cannot immediately appeal the denial of a qualified immunity claim if the plaintiff has also sought injunctive relief. 846 F.2d at 961-963 (overruling *England* v. *Rockefeller*, 739 F.2d 140 (4th Cir.), cert. denied, 469 U.S. 948 (1984), and *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir.), cert. denied, 469 U.S. 948 (1984)).

[13] See also *Musso* v. *Hourigan*, 836 F.2d 736, 742 n.1 (2d Cir. 1988) (relying on the line of circuit court decisions cited in the text to find appellate jurisdiction over the denial of a qualified immunity claim where the defendant was subject to

case, App., *infra*, 4a-7a, and the Eleventh Circuit in *Marx* v. *Gumbinner*, 855 F.2d at 787-788, expressly rejected the holding and reasoning of the Third Circuit in *Prisco* v. *United States*, *supra*.[14] Only the Third Circuit has held that a plaintiff's request for injunctive relief deprives an order denying an official's claim of qualified immunity of the finality necessary to permit an immediate appeal.

b. The Third Circuit's holding in *Prisco* is incorrect. *Prisco* held that an order of this type is not immediately appealable under *Forsyth* because the case would go forward on the plaintiff's prayer for injunctive relief even if the defendant public official were entitled to qualified immunity from damages liability. But a government official against whom injunctive relief has been sought is essentially a defendant in name only, a surrogate for the agency that he works for or directs. "As a practical matter, a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all." *Scott*, 811 F.2d

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a trial for damages on other grounds); *Bolden* v. *Alston*, 810 F.2d 353, 356-357 (2d Cir. 1987) (upholding appellate jurisdiction when the district court had resolved the defendant's qualified immunity claim and the merits of the plaintiff's claims, but had not yet ruled on the plaintiff's request for injunctive relief), cert. denied, 484 U.S. 896 (1987); *Brown* v. *Texas A & M Univ.*, 804 F.2d 327, 331-332 (5th Cir. 1986) (relying on *Forsyth* to uphold appellate jurisdiction over the defendant's appeal from the denial of qualified immunity in an action under 42 U.S.C. 1983 even though the defendant was also sued in his official capacity under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, and that claim would proceed to trial).

[14] Although *Marx* v. *Gumbinner* involved a claim of absolute rather than qualified immunity, the Eleventh Circuit did not distinguish between the two types of claims for purposes of appellate jurisdiction.

at 1153. To the extent the injunction is sought against the officer in his official capacity, "[i]f he leaves office during the interim, he leaves the case behind and his successor becomes the party." *Id.* at 1154. See *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304, 2311 (1989); *Kentucky* v. *Graham*, 473 U.S. 159, 165-166 (1985); *Brandon* v. *Holt*, 469 U.S. 464, 470-471 (1985). *E.g.*, Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c)(1); Sup. Ct. R. 35.3. If an injunction is granted against a public official, he "will simply be ordered by the court to do something, at the state's expense," or to refrain from doing something, whereas an unsuccessful defendant in a damage suit "will be liable in his *personal* capacity for a monetary payment of some amount." *Marx*, 855 F.2d at 787-788. "[E]ven if he ultimately prevails in an appeal from final judgment, his personal assets will be subject to attachment pending the appeal unless he posts, at his own expense, a supersedeas bond." *Id.* at 788. "[T]he threat of exposure" to a damages action, as contrasted with a suit for injunctive relief, "is much more likely to have the effect of dampening the ardor with which the individual carries out his official functions." *Ibid.* And denying interlocutory appellate review simply because the plaintiff has sought equitable relief "might invite plaintiffs to include spurious injunctive claims to avoid interlocutory appeal of the immunity question, and thus force the defendant to face the tribulations of a trial from which he may be properly immune." *De Abadia*, 792 F.2d at 1190. Accord *Young*, 846 F.2d at 962; *DeVargas*, 844 F.2d at 717-718; *Scott*, 811 F.2d at 1154 ("The rule concerning jurisdiction affects the number of requests for injunctions; we cannot simply assume that the way the

plaintiff frames his claims is exogenous."); *Kennedy*, 797 F.2d at 306.

For all of these reasons, "the entitlement to be free from suit on a claim for money damages is, in the context of a suit against a government official, conceptually distinct from an entitlement to be free from suit on a claim for injunctive relief." *Marx*, 855 F.2d at 788. And once that principle is accepted —as this Court did in *Forsyth*, 472 U.S. at 527-528 —"the rationale underlying the Third Circuit's rule breaks down," while "the policy reasons for according the government official immunity to suit for money damages—and hence the reasons for allowing an immediate appeal if that immunity is denied—remain." *Marx*, 855 F.2d at 788. Accordingly, the rule adopted by the Ninth Circuit, unlike the one adopted by the Third Circuit, will promote the important public policies that this Court strove to protect in *Forsyth*.[15]

2. The question that the Ninth Circuit decided adversely to petitioner warrants review by this Court. The Ninth Circuit believed that plaintiffs in some *Bivens* cases could not survive a motion for summary judgment on qualified immunity grounds without first undertaking discovery, yet also believed that this Court had barred all discovery until after the qualified immunity issue has been resolved. The only way to resolve this "dilemma," the Ninth Circuit held, was to relax "the ordinary rules of admissibility in the case of affidavits used to oppose

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[15] We presented the jurisdictional question as one of two questions in our certiorari petition in the *Prisco* case. Although the Court denied certiorari in *Prisco*, a question arose in that case whether the appellate jurisdiction issue had become moot, and that question may have affected the Court's decision not to grant review.

qualified immunity motions." App., *infra*, 10a. In so ruling, however, the Ninth Circuit erroneously decided a question of considerable public importance regarding the proper litigation of qualified immunity claims in district court.

There is no question in this case that under the rules normally applicable to summary judgment motions, defendant's motion should have been granted. Thus, the Ninth Circuit's "relax[ed]" approach to the use of affidavits to oppose summary judgment motions on qualified immunity grounds substantially lightens the burden on a plaintiff to defeat such motions. And it does so despite this Court's admonition that the Federal Rules of Civil Procedure should be applied in a manner that helps vindicate the strong policy interests underlying the qualified immunity doctrine.

a. Rule 56 of the Federal Rules of Civil Procedure establishes the standard for a district court to use in resolving a motion for summary judgment. Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) provides that a party against whom summary judgment has been sought "may not rest upon the mere allegations or denials of the adverse party's pleadings," and "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." And if affidavits are relied upon, they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show af-

firmatively that the affiant is competent to testify to the matters stated therein." *Ibid.*

Thus, a party against whom summary judgment has been sought "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Id.* at 587; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *First Nat'l Bank* v. *Cities Serv. Co.*, 391 U.S. 253, 289 (1968). In sum, as this Court has explained, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986). When no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 323. See also *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990).

This Court's decision last Term in *Lujan* v. *National Wildlife Fed'n*, *supra*, is particularly instructive on this issue since the Court explained how Rule 56 should be applied when a party relies on affidavits to establish an essential element of its case. In *Lujan*, the plaintiffs claimed that they had standing to challenge federal land management decisions because they used land "in the vicinity" of the affected region, which encompassed thousands of acres. 110

S. Ct. at 3187. The court of appeals held that the plaintiffs' affidavits were sufficient to establish an injury-in-fact because a court must "assume" that the affiants in fact used the affected acres, or else their allegations would be "meaningless, or perjurious." *Id.* at 3188. This Court squarely rejected that approach to applying Rule 56(e). "The object of this provision," the Court stated, "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. * * * Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." 110 S. Ct. at 3188-3189. For that reason, the Court made clear that "[i]t will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege," because such a presumption would "convert[] the operation of Rule 56 to a circular promenade" in which a court assumes what the Rule requires a party to prove simply on the ground that the alternative required by the Rule would be summary judgment. *Id.* at 3189.

The Ninth Circuit committed essentially the same mistake as the D.C. Circuit in *Lujan*. The Ninth Circuit frankly recognized that respondent's affidavit did not expressly support his claims that petitioner tried to coerce him into committing perjury [16] and

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[16] "Although the affidavit contained no support for [respondent's] allegation that [petitioner] attempted to coerce him into committing perjury, it does allege the facts from which [respondent] apparently inferred an intent to get him to testify 'or else.'" App., *infra*, 11a.

that petitioner coerced Ducharme into dismissing respondent.[17] Indeed, in both respects, the affidavit fell far short of the explicit requirements of Rule 56(e). Yet in both instances, the Ninth Circuit excused otherwise fatal deficiencies by tolerating the type of "speculation and inference" that the Court rejected in *Lujan*.

That this case is a *Bivens* action affords more, not less, reason strictly to enforce the requirements of Rule 56. The Court has explained that a *Bivens* action "can be terminated on a properly supported motion for summary judgment based on the defense of immunity," *Butz* v. *Economou*, 438 U.S. 478, 508 (1978), and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits," *ibid.* See also *Harlow*, 457 U.S. at 819-820 n.35. The Ninth Circuit's novel approach to Rule 56 is at odds with this Court's precedents.

The Ninth Circuit justified its new approach on the ground that the district court—in accordance with this Court's directives in cases involving a claim of qualified immunity—had stayed discovery until that claim was resolved. App., *infra*, 11a; see *id.* at 10a & n.1. But the Ninth Circuit went wrong in both respects. It is true that discovery should generally and ordinarily be enjoined until after the qualified immunity question is resolved, because that immunity is in part an entitlement to avoid litigation. *Anderson* v. *Creighton*, 483 U.S. 635, 646-647

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[17] "[W]hile the affidavit contained no reference to an attempt by [petitioner] to coerce [respondent's] employer in order to secure [respondent's] discharge, [respondent] could not have attested to any coercion of the employer if he had no personal knowledge of such coercion." App., *infra*, 11a.

n.6 (1987); *Mitchell* v. *Forsyth*, 472 U.S. at 527. But when a claim of qualified immunity is presented in a summary judgment motion and the parties offer different versions of the defendant's allegedly unlawful conduct, some discovery "tailored specifically" to the immunity issue "may be necessary" in order to resolve that question. *Anderson*, 483 U.S. at 646-647 n.6. Permission to engage in such limited discovery may be sought under Rule 56(f), which states that a party who cannot present "facts essential to justify [its] opposition" must file an "affidavit" giving the "reasons" for that inability. The court then "may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In this case, respondent never filed such an affidavit in opposition either to the summary judgment motion or to the motion for a protective order that was pending at the same time; instead, he relied entirely on his legal argument in his opposition to petitioner's summary judgment motion. Under these circumstances, "a greater tolerance of speculation and inference," App., *infra*, 10a, is hardly faithful to this Court's insistence on a "firm application of the Federal Rules of Civil Procedure" in *Bivens* cases. *Butz* v. *Economou*, 438 U.S. at 508. Accordingly, the Ninth Circuit erred, first, in assuming that in this case, as in *Bivens* cases generally, discovery is always and entirely barred until after the district court has answered the qualified immunity question on summary judgment, and, second, in relaxing the rules of summary judgment in a plaintiff's favor.

b. The court of appeals' approach to the role of affidavits in qualified immunity cases is inconsistent with the approach taken by other circuits on this

question. For example, the First Circuit has made clear that a plaintiff must present specific facts in support of the allegations in his complaint in order to defeat a properly supported claim of qualified immunity on summary judgment. In *Rogers* v. *Fair*, 902 F.2d 140 (1990), the First Circuit held that government officials were entitled to summary judgment because of the dearth of facts supporting an alleged conspiracy to deny the plaintiff a prison furlough due to the religion of his sponsors. *Id.* at 143. The court held that the combination of (a) a prejudicial statement allegedly made by one of the defendants and (b) plaintiff's conjecture was not sufficient, without more, to defeat the defendants' entitlement to qualified immunity. *Ibid.* The evidence necessary to resist summary judgment, the court emphasized, must be more than merely "colorable"; it must be support of the allegations in his complaint in order "significantly probative." *Ibid.* (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 249-250).

The Tenth Circuit has expressly held that a plaintiff opposing summary judgment must present specific, probative facts supporting his constitutional claim in order to defeat a contrary claim of qualified immunity. *Lewis* v. *City of Fort Collins*, 903 F.2d 752, 758-759 (1990). A plaintiff who is unable to make this required showing can resist summary judgment only by filing an affidavit under Fed. R. Civ. P. 56(f) specifying why discovery is necessary. As the Tenth Circuit explained, "in response to a summary judgment motion based on qualified immunity, a plaintiff's 56(f) affidavit must demonstrate '*how* discovery will enable [him] to rebut a defendant's showing of objective reasonableness' or, stated alternatively, demonstrate a 'connection between the information he would seek in discovery and

the validity of the [defendant's] qualified immunity assertion.'" 903 F.2d at 758 (quoting *Jones* v. *City and County of Denver*, 854 F.2d 1206, 1211 (10th Cir. 1988)) (emphasis added in *Lewis*). A general, unparticularized declaration of the need for discovery does not satisfy these requirements. *Id.* at 758-759; *id.* at 759 ("[Plaintiff] has not explained how any specific documents or depositions will aid in rebutting defendants' showing of objective reasonableness. Rule 56(f) is not a license for a fishing expedition, especially when summary judgment is urged based on a claim of qualified immunity.").[18]

c. The question of how the district courts should adjudicate summary judgment motions in *Bivens* cases is one that arises often and is clearly of sufficient public importance to warrant review by this Court. This Court's decision in *Anderson* requires courts to focus the qualified immunity analysis on the particular conduct that a public official is alleged to have committed. That focus has important consequences for the adjudication of qualified immunity claims, for two reasons. Oftentimes the parties will disagree over what the defendant is alleged to have done, yet it is common for public officials to seek a protective order from the district court barring discovery until after the qualified immunity issue is resolved. In the wake of the Ninth Circuit's decision, numerous public officials who are entitled to immunity from damages liability—an immunity that should preclude being subjected to costly pretrial and

[18] Thus, the Tenth Circuit rejected the plaintiff's contention that her claim of age discrimination required discovery, ruling that her circumstantial evidence and conclusory allegations were inadequate to defeat qualified immunity. 903 F.2d at 759-760.

trial procedures—will instead be forced to stand trial because competent affidavits and other documentation will not be required in order to defeat a motion for summary judgment.

This case vividly illustrates those deleterious effects. Federal law enforcement officials must often contact private employers in order to seek assistance in an investigation. Yet, any time a party is demoted or dismissed after such a contact, there is a risk that the law enforcement officer involved will be forced to undergo the expense and burdens of extensive litigation in a *Bivens* action. Under the Ninth Circuit's newly minted approach, a plaintiff can merely allege that his employer was coerced into discharging him; the courts must (erroneously) assume that the plaintiff has no access to the critical evidence of what transpired between his former employer and the officer; and the courts are free to engage in "speculation and inference" about what depositions of witnesses and inaccessible documents might disclose. In sum, mere contact between a government official and a private employer, if coupled with an adverse action taken against the employee by the employer, may be sufficient to establish a triable issue of the invasion of clearly established due process rights. This is precisely the type of chill on legitimate government action that the qualified immunity doctrine was designed to prevent.

Finally, this Court recently granted certiorari in *Siegert* v. *Gilley*, No. 90-96 (Oct. 15, 1990), which raises a question regarding the degree of specificity required of the plaintiff in a *Bivens* action. The petitioner in *Siegert* maintains that the so-called "heightened pleading standard" required by some courts of appeals is inconsistent with the Federal Rules of Civil Procedure and this Court's decisions,

and that the court of appeals erred in ordering his complaint dismissed without any opportunity for discovery. The question presented by this case is closely related to that in *Siegert*. The *Siegert* case involves a challenge to the "heightened pleading standard," whereas this case involves the adequacy under the summary judgment rule of the plaintiff's proof in support of his allegations. But this case and *Siegert* both raise oft-recurring questions of considerable practical importance to the disposition of *Bivens* cases. We therefore urge this Court to grant the petition in this case and to set the case for argument in tandem with *Siegert* so that the Court can fully address the practical problems raised by the litigation of qualified immunity claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-1771

D.C. No. CV-LV-85-001, LDG
HERMAN LOUIS DI MARTINI,
PLAINTIFF/APPELLEE

v.

LYNN JAY FERRIN, Special Agent,
Federal Bureau of Investigation,
DEFENDANT/APPELLANT

Appeal from United States District Court
for the District of Nevada
Lloyd D. George, District Judge, Presiding

Argued and Submitted
August 15, 1989—San Francisco, California

Filed November 21, 1989

Before: Alfred T. Goodwin, Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Goodwin

OPINION

GOODWIN, Chief Judge:

This interlocutory appeal arises out of a suit by Di Martini seeking damages and injunctive relief from FBI Special Agent Ferrin. Di Martini sued Ferrin in his individual capacity under the cause of action recognized in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Ferrin moved for summary judgment on the ground that he was entitled to qualified immunity. The district court denied the motion and Ferrin appeals.

We must consider first whether an order denying summary judgment based on qualified immunity is immediately appealable when the plaintiff seeks injunctive relief as well as money damages. We will consider whether it was error to deny Ferrin's motion for summary judgment if we have jurisdiction to consider the merits.

In the course of an FBI investigation of organized crime in Las Vegas casinos, Special Agent Ferrin interviewed Di Martini, an employee at the Stardust Hotel and Casino, concerning his knowledge of illegal activities at the Stardust. Di Martini denied such knowledge. After various employees of the Stardust were indicted, Agent Ferrin again contacted Di Martini, who was then working at the Sands Hotel, to request his assistance in the upcoming criminal trial. Di Martini reiterated that he had no knowledge that those named in the indictments were engaged in criminal activity. Thereafter, the Sands Hotel dismissed Di Martini from his position.

Di Martini then commenced this *Bivens* action seeking equitable relief and damages from Ferrin. He alleged that Ferrin attempted to harass and in-

timidate him into cooperating in a criminal investigation. He also alleged that out of malice and in order to retaliate for Di Martini's refusal to cooperate, Ferrin caused Di Martini to be discharged from his employment at two casinos, damaged his name and reputation, and thereby prevented him from securing other employment Accordingly, Di Martini alleged that Ferrin violated his free speech and association rights, his privacy rights under the ninth and tenth amendments, his equal protection rights, and his fifth amendment due process rights.

Ruling on a motion to dismiss, the district court rejected as frivolous all but the fifth amendment claim. Di Martini does not appeal this ruling. The district court found that the facts as alleged could give rise to a fifth amendment violation.

Before discovery took place on the fifth amendment claim, Ferrin moved for summary judgment on the basis of qualified immunity, arguing that his actions, even as alleged, did not violate clearly established fifth amendment rights. Ferrin also filed a motion for a protective order staying all discovery pending the court's ruling on the qualified immunity issue. The district court granted the protective order, Order, CV-S-85-001-LDG (July 30, 1987), and subsequently denied the motion for summary judgment. Ferrin filed a timely appeal.

I. JURISDICTION

As a threshold matter, we must decide whether we have jurisdiction to hear this appeal. A district court's order denying a motion for summary judgment ordinarily is not reviewable. *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989). The Supreme Court has held, however, that an order deny-

ing qualified immunity in a section 1983 action for money damages is immediately appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). The question whether such denials are appealable when a claim for equitable relief is also pending in the trial court, however, remains open in this circuit and divides others.

We hold with the majority of courts, that the collateral order doctrine entitles officials to interlocutory review of denials of immunity, even though claims for equitable review are joined with damage claims. *See De Vargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 717-20 (10th Cir. 1988); *Young v. Lynch*, 846 F.2d 960, 961 (4th Cir. 1988); *Drake v. Scott*, 812 F.2d 395, 398 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987); *Scott v. Lacy*, 811 F.2d 1153, 1153-54 (7th Cir. 1987); *De Abadia v. Izquierdo Mora*, 792 F.2d 1187, 1190 (1st Cir. 1986); *Kennedy v. City of Cleveland*, 797 F.2d 297, 305-06 (6th Cir.), *cert. denied*, 479 U.S. 1103 (1987); *Tubbesing v. Arnold*, 742 F.2d 401, 404 (8th Cir. 1984); *see also Musso v. Hourigan*, 836 F.2d 736, 742 n.1 (2d Cir. 1988) (appellate jurisdiction proper over fourth amendment immunity claim though other damages claim pending). *Contra Prisco v. United States, Department of Justice*, 851 F.2d 93, 95-96 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 2428 (1989); *Riley v. Wainwright*, 810 F.2d 1006, 1007 (11th Cir. 1987) (per curiam) (presence of claim for injunctive relief alternative ground for denying appeal); *but see Marx v. Gumbinner*, 855 F.2d 783, 787-88 (11th Cir. 1988) (siding with the majority view; no attempt to distinguish *Riley*); *Bever v. Gilbertson*, 724 F.2d 1083, 1088 (4th Cir.) *cert. denied*, 469 U.S. 948 (1984).

Under the collateral order doctrine, an interlocutory order is appealable if it is effectively unreviewable on appeal from final judgment, conclusively determines the disputed question, and resolves an important issue separable from the merits of the action. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Applying this test, the Supreme Court reasoned in *Mitchell* that the denial of a claim for absolute immunity is appealable immediately because the essence of the claim is "its possessor's entitlement not to have to answer for his conduct in a civil damages action." 472 U.S. at 525. The Court concluded that qualified immunity is also an entitlement not to be sued, an entitlement which would be lost if the case erroneously went to trial. Thus, such a claim would be effectively unreviewable at a later stage of the litigation. *Id.* at 525-27. Turning to the remaining two requirements under the collateral order doctrine, the Court concluded that denials of qualified immunity would determine conclusively the disputed question and could be considered separable from, and collateral to, the rights asserted in the action. *Id.* at 527-29. In a footnote, however, the Court expressly reserved the question whether orders denying qualified immunity in cases seeking both damages and equitable relief similarly could be appealed at the interlocutory stage. *Id.* at 519 n.5.

The Third Circuit has answered this question in the negative, holding that the inclusion of a claim for equitable relief defeats the immediate appealability of a denial for qualified immunity. *Prisco*, 851 F.2d at 96. The court reasoned that the rationale favoring immediate review of denials of qualified immunity "has only the slightest application to a case involving claims for both prospective relief and money damages." *Id.* at 96. "That rationale is that the

collateral interest being protected is the freedom from having to defend a lawsuit; this interest . . . is lost beyond recall even if the [government official] prevails at trial." *Id.* (emphasis in original). Because the defense of qualified immunity is inapplicable to claims for prospective relief, a suit seeking both prospective relief and money damages does not end for the official who successfully asserts a defense of immunity. *Id.*

We do not consider the benefit to an official from interlocutory review in these cases to be marginal, however. Rather, we agree with the view of the majority of the circuits that "there are considerable differences in both time and expense in defending a case that involves both damages and equitable relief as contrasted to a case that involves equitable relief alone." *Young*, 846 F.2d at 962. In fact, the Seventh Circuit has noted that "[a]s a practical matter, a public official who is a defendant in a suit seeking an injunction is not 'on trial' at all. The suit seeks relief against him in his official capacity; he need not attend the trial, which will be conducted by attorneys representing the governmental body. If he leaves office during the interim, he leaves the case behind and his successor becomes the party." *Scott*, 811 F.2d at 1153-54.

Moreover, the collateral order doctrine itself entities officials to interlocutory review of denials of immunity, even though claims for equitable relief are involved. First, a denial of qualified immunity in a case combining legal and equitable claims is as unreviewable at a later stage as is a denial of qualified immunity involving only legal claims. The *Mitchell* Court determined that the essence of the immunity is the right to avoid trial. Likewise, as the Seventh Circuit noted, a public official who is a defendant in

a suit seeking an injunction is not really on trial at all, and the "declaration that the official is immune from damages ends the case for that official personally, even though it may not end the case for the body he represents." *Scott*, 811 F.2d at 1153. Thus, the fact that a suit includes equitable claims does not make the immunity decision any less "effectively unreviewable" than a suit involving only legal claims.

Denying the official interlocutory review denies him or her the right to avoid trial, and prolongs the pressures of having his or her personal finances at risk. See *Prisco*, 851 F.2d at 95 ("the policy rationale for qualified immunity is that we do not want officials to make discretionary decisions with one wary eye on their pocketbook"). Because the issue of immunity is irrelevant to a district court's consideration of equitable claims, the inclusion of such claims should not affect the extent to which the immunity determination is either conclusive or collateral.

II. QUALIFIED IMMUNITY

Ferrin contends that as an FBI agent he is entitled to qualified immunity against Di Martini's allegation. Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id.; see also Davis v. Scherer*, 468 U.S. 183, 191 *reh'g denied*, 468 U.S.

1226 (1984). Ferrin is entitled to summary judgment based on qualified immunity only if, viewing the facts in the light most favorable to Di Martini, the facts as alleged do not support a claim that Ferrin violated clearly established law. *Mitchell*, 472 U.S. at 528 n.9. This is a purely legal question which this court reviews *de novo*. *Id.* at 528; *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989); *Vaughn v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 1655 (1989).

A. DI MARTINI'S ALLEGATIONS

Di Martini alleged that through threats, harassment and intimidation, Agent Ferrin (1) attempted to coerce Di Martini into cooperating in an investigation and committing perjury; (2) caused Di Martini's employer to fire Di Martini; and (3) caused the loss of Di Martini's good name and reputation and thereby interfered with Di Martini's future employment possibilities. He claims that these actions deprived him of his due process rights.

Ferrin, on the other hand, claims that Di Martini has failed to come forward with specific facts showing that there was a genuine issue for trial. Ferrin correctly notes that in the face of a well-supported motion for summary judgment, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e) (1989); *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 587. General allegations or denials in the complaint or

pleadings are not sufficient to withstand summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also White By White v. Pierce County*, 797 F.2d 812, 815 (9th Cir. 1986) ("Even in the absence of opposing affidavits, summary judgment [based on qualified immunity] is inappropriate where the movant's papers are insufficient on their face.").

In this case, however, the district court stayed all discovery in the proceedings pending its ruling on Ferrin's motion for summary judgment based on qualified immunity. The Supreme Court has held that until the threshold issue of immunity is resolved, discovery should not proceed. *Harlow*, 457 U.S. at 818; *cf. Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (denial of discovery is appropriate on qualified immunity issue where actions alleged by plaintiff are such that a reasonable officer could have believed they were lawful). In reviewing a district court's denial of summary judgment advanced on grounds of qualified immunity we must accept as true the facts stated in the affidavits. *Schwartzman v. Valenzuda*, 846 F.2d 1209, 1211 (9th Cir. 1988) (circuit recognizes that the Supreme Court has limited scope of interlocutory appellate review of immunity claim to a purely legal question; the correctness of the plaintiff's version of the facts is not considered). If the facts as alleged by Di Martini violated clearly established law, summary judgment was properly denied. *Id.* If, on the other hand, Di Martini alleged only that Agent Ferrin violated his fifth amendment rights, without alleging any specific facts, summary judgment should have been granted.

Before deciding the question, we must briefly explore the role of affidavits in qualified immunity

cases. Because the Supreme Court has barred discovery until after the trial judge can answer the legal question whether the alleged acts constitute a constitutional violation that was clearly established at the time, a plaintiff may often have no way to defend against a summary judgment motion other than through is own affidavit. In order to survive the motion, the plaintiff must set forth facts sufficient to raise the constitutional question. However, he cannot depose the percipient witnesses who could testify to those facts, and he may not himself have directly observed all of the critical events.

This dilemma requires some relaxation of the ordinary rules of admissibility in the case of affidavits used to oppose qualified immunity motions. For example, since plaintiffs cannot compel testimony from others when opposing such motions, they must be allowed to rely on what those witnesses have told them, i.e. hearsay. Similarly, plaintiffs may not be able to obtain documents in the possession of others, and may be compelled, instead, to set forth their understanding of the contents of those documents in their own affidavits. Thus, the best evidence rule cannot always be strictly enforced. Also, a greater tolerance of speculation and inference must be afforded. At a later stage in the proceedings plaintiff will, of course, be required to establish the facts by more traditional means. However, where the issue to be resolved on summary judgment is solely whether the law was clearly established at a particular time, and compelled testimony regarding the operative facts is precluded, a plaintiff must be permitted to set forth his understanding of the facts whether or not his knowledge is first-hand or meets all the ordinary rules of evidence.

Applying this standard, we hold that the affidavits create a genuine dispute of material fact: whether Ferrin intimidated Di Martini into cooperating with him and caused him to be discharged from his employment at the Sands Hotel. A rational trier of fact could infer from Di Martini's alleged conversation with his employer that agent Ferrin in fact demanded Di Martini's discharge. Moreover, while the affidavit contained no reference to an attempt by Ferrin to coerce Di Martini's employer in order to secure Di Martini's discharge, Di Martini could not have attested to any coercion of the employer if he had no personal knowledge of such coercion. Although the affidavit contained no support for Di Martini's allegation that Agent Ferrin attempted to coerce him into committing perjury, it does allege the facts from which Di Martini apparently inferred an intent to get him to testify "or else." [1]

Di Martini's third claim that Ferrin infringed upon Di Martini's right to pursue future employment, however, is not supported by his complaint. Di Martini's complaint contains no specific allegation that Di Martini was blacklisted in the casino industry or otherwise blocked in pursuing the career of his choice. There is no direct evidence to suggest that Ferrin's actions could have had such an effect on Di Martini's future. On summary judgment, a plaintiff is not entitled to survive on vague assumptions about informal communications within an industry.

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[1] Because the district court stayed all discovery it was impossible for Di Martini to allege specifically either Ferrin's attempt to coerce Di Martini's employer in order to secure his discharge or his intent to coerce Di Martini into committing perjury.

B. CLEARLY ESTABLISHED RIGHTS

If either of Di Martini's first two allegations violate clearly established statutory or constitutional rights of which a reasonable person should have known, *Harlow*, 457 U.S. at 818, then the district court properly denied agent Ferrin qualified immunity.[2] Because we hold that Di Martini's first allegation establishes such a right, we need not address his second allegation.

Since *Harlow*, the Supreme Court has explained that it is not enough that the general constitutional right alleged to have been violated was clearly established. The plaintiff must allege the right in a more particularized way: specifically, the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right. *Anderson*, 483 U.S. at 639-40 (1987).

The Supreme Court has noted that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 492 (1959). However, a

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[2] Ferrin also asserts that even if this court finds that Di Martini's complaint alleged the violation of a clearly established property or liberty right, Di Martini essentially amended his complaint when he filed an affidavit opposing the summary judgment motion which was far more limited in scope than his original complaint. This claim has no merit. Even if we were to focus upon the affidavit rather than the complaint, it is not as limited in scope as Ferrin claims, and can be read to assert both that Ferrin attempted to intimidate him into cooperating in the investigation and that Ferrin caused him to be discharged from his employment at the Sands Hotel.

plaintiff must show more than an expectation in continued employment; he must demonstrate a claim of entitlement to continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Such an entitlement stems not from the Constitution itself but from "existing rules and understandings that stem from an outside source such as state law." *Id.*

While Di Martini may not be able to demonstrate that Nevada law provides him with an entitlement enforceable against his employer,[3] his complaint alleges that Ferrin, not the Sands Hotel, interfered

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[3] This court has held that state law can create a constitutionally significant property interest in private employment. *See Merritt v. Mackey*, 827 F.2d 1368, 1374 (9th Cir. 1987) (Norris, J., concurring). Di Martini's allegations, however, fail to fit squarely within the relevant and clearly established Nevada law. First, the Nevada Supreme Court has noted that a contract for continued employment can be the basis of a property or liberty interest. *Tarkanian v. National Collegiate Athletic Assoc.*, 103 Nev. 331, 741 P.2d 1345 (Nev. 1987), *rev'd on other grounds*, —— U.S. ——, 109 S.Ct. 454 (1988). The record on appeal, however, does not reveal anything about the nature of Di Martini's employment contract. Second, Di Martini relies on Nevada case law establishing that an at-will employee has at least a limited right to continued employment because he cannot be terminated when the purpose of the termination offends public policy. *See Hansen v. Harrah's*, 100 Nev. 60, 674 P.2d 394 (1984) (Nevada adopts a public policy exception to at-will employment rule and recognizes a tort action for retailiatory discharge resulting from employee filing of worker's compensation claim). Public policy is not offended when an individual is asked to cooperate with law enforcement officials. Di Martini argues that he had an entitlement to continued employment at least to the extent that termination was based solely on wrongful coercion. As Ferrin points out, however, the record is devoid of any description of Di Martini's employment arrangement at the Sands Hotel. Thus we cannot properly notice the fact implicitly asserted by Di Martini that he was an at-will employee.

with his private employment. The Eighth Circuit recently has adopted the view that even when an employee has no entitlement "to continued employment enforceable against his employer, he does have a right enforceable in law against third parties who unlawfully interfere with the employment relation." *Chernin v. Lyng*, 874 F.2d 501, 505 (8th Cir. 1989).

In *Chernin*, the appellant lost his job with meatpacking company when the U.S. Department of Agriculture made his termination a condition for providing inspection services which are required for the operation of a meatpacking business. The court noted that employees, even at-will employees, have a common-law right enforceable in law against third parties who unlawfully interfere with the employment relation. The court based its finding on the Supreme Court's decision in *Truax v. Raich*, 239 U.S. 33 (1915), which established a constitutional cause of action when a government agent unlawfully interferes with a private employment relationship. *Id.* at 41; *see also Greene*, 360 U.S. at 492 ("[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment, . . ."). The court further reasoned that neither *Raich*, *Greene*, nor the Supreme Court's recent decision in *Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230 (1988) (FDIC cannot arbitrarily interfere with a bank employee's employment relationship with a bank), require that an employee demonstrate an entitlement to future employment enforceable against his or her employer in order to be protected under the due process clause against arbitrary government interference. *Chernin*, 874 F.2d at 506.

We agree with the Eight Circuit's reasoning and hold that even if he did not have an entitlement to employment enforceable against the Sands Hotel, Di Martini did have clearly established liberty and property interests against officious third party interference with his private employment. Because we find that Di Martini alleged sufficient facts to support a claim that Ferrin violated this right, Ferrin is not entitled to qualified immunity and the court properly denied his motion for summary judgment.

This court's decision in *Johnson v. Serv-Air, Inc.*, Nos. 86-1922 & 86-2735, Slip Op. (Nov. 18, 1987) does not bind us to a contrary conclusion. It is an unpublished disposition, and has no precedential value. *See* Ninth Circuit Rule 36-3 (1989). Ferrin, however, claims that *Johnson* supports his position that the due process violations alleged here are not clearly established. He asks this court to consider *Johnson* despite the fact that it is unpublished. Because it is not directly "relevant under the doctrines of law of the case, res judicata, or collateral estoppel," Ninth Circuit Rule 36-3 (1989), we must decide this case without considering *Johnson*. Ferrin's request is therefore denied.

The district court's order denying summary judgment based on qualified immunity, is AFFIRMED. This case is REMANDED to the district court to lift the protective order staying discovery and proceed to trial on the merits of Di Matrini's fifth amendment claim. Costs on appeal should be stayed pending the determination of the "prevailing party."

AFFIRMED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-1771

D.C. No. CV-LV-85-001, LDG

HERMAN LOUIS DI MARTINI,
PLAINTIFF/APPELLEE

v.

LYNN JAY FERRIN, Special Agent,
Federal Bureau of Investigation,
DEFENDANT/APPELLANT

Filed June 25, 1990

Before: Alfred T. Goodwin, Chief Judge, Harry Pregerson and Stephen Reinhardt, Circuit Judges.

ORDER AMENDING OPINION

The opinion filed November 21, 1989 and appearing at 889 F.2d 922 (9th Cir. 1989) is amended as follows:

The text of the original opinion commencing at page 928, the first paragraph, ninth line, beginning

with "However, a plaintiff must show . . . ." to and including, page 929, the first carry-over paragraph, ending with "[P]roperly denied his motion for summary judgment." is deleted. In lieu thereof, the following text is inserted:

> Moreover, the Supreme Court did not refer to this constitutional right for the first time in *Greene*. On the contrary, *Greene* cited numerous Supreme Court decisions. *Id.* (citing "*Dent v. West Virginia*, 129 U.S. 114; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Peters v. Hobby*, 349 U.S. 331, 352 (concurring opinion); *cf. Slochower v. Board of Education*, 350 U.S. 551; *Traux v. Raich*, 239 U.S. 33, 41; *Allgeyer v. Louisiana*, 165 U.S. 578, 589-590; *Powell v. Pennsylvania*, 127 U.S. 678, 684"). We recognize that these are "substantive due process" cases, but the court's reliance upon them in *Greene* reaffirms the existence of this constitutional right. We find, therefore, that Di Martini has a clearly established constitutional right to be free from unreasonable government interference with his private employment.[3]

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[3] Our conclusion is consistent with our decision in *Merritt v. Mackey*, 827 F.2d 1368 (9th Cir. 1987). In that case we cited *Greene* and state that "[i]t is undisputed that an individual may have a protected property interest in private employment." *Id.* at 1370. We also noted that:

> *Greene* makes clear . . . that when a private employee is deprived of his employment through government conduct, the cause of action available to the employee is not merely the right to sue for interference with contractual relationships. . . . Thus, where the actions of private individuals operate to deprive an individual of his employment, a suit for interference with private contractual relationship would lie, but where government officials are

For the purpose of a due process claim, an employee must show more than an expectation in continued employment; he must demonstrate a claim of entitlement to continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2719, 33 L.Ed.2d 548 (1972). In *Merritt* we held that a legitimate claim of entitlement to continued employment must be proven before a due process violation can exist from unreasonable government interference with one's employment. *Merritt*, 827 F.2d at 1371. In this case, however, we are not deciding whether a due process violation has occurred. Rather, our current task is to determine whether a reasonable person should have been aware that Di Martini had a clearly established right to employment free from unreasonable government interference. A reasonable government employee would not necessarily be aware of the nature of a private employment relationship. We therefore hold that to defeat a motion for qualified immunity where the government may have unreasonably interfered with one's private employment, the employee does not need to demonstrate

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involved, the nature of the interest at stake in private employment is a property interest.

Id. at 1370-71. *See also Chernin v. Lyng*, 874 F.2d 501, 505-06 (8th Cir. 1989) (recognizing an employee's right to be free from unreasonable third party interference with an employment relationship). We do not, however, rely on these cases to hold that this right was clearly established when Ferrin allegedly interfered with Di Martini's employment; *Merrill* and *Cherin* were decided after these incidents. *See Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989) (court must look to the legal lanscape at the time of the incident to determine whether a right is clearly established).

an entitlement to future employment enforceable against his or her employer. Di Martini has alleged the existence of a property right to continued employment enforceable against his employer.[4] When considering the merits of Di Martini's due process claim, the district court will need to determine whether such entitlement exists.

With the opinion thus amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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[4] Di Martini relies upon Nevada law to establish an entitlement enforceable against his employer. This court has held that state law can create a constitutionally significant propererty interest in private employment. *See Merritt*, 827 F.2d at 1374 (Norris, J., concurring). Nevada law recognizes that a contract for continued employment can be the basis of a property or liberty interest. *Tarkanian v. National Collegiate Athletic Assoc.*, 103 Nev. 331, 741 P.2d 1345 (Nev. 1987), *rev'd on other grounds*, —— U.S. ——, 109 S. Ct. 454 (1988). Nevada also recognizes that an at-will employee has at least a limited right to continued employment because he cannot be terminated when the purpose of the termination offends public policy. *See Hansen v. Harrah's*, 100 Nev. 60, 674 P.2d 394 (1984) (Nevada adopts a public policy exception to at-will employment rule and recognizes a tort action for retaliatory discharge resulting from employee filing of worker's compensation claim). The record on appeal, however, does not reveal anything about the nature of Di Martini's employment arrangement at the Sands Hotel.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-LV-35-01-LDG

HERMAN LOUIS DI MARTINI, PLAINTIFF

vs.

LYNN JAY FERRIN, ETC., DEFENDANT

ORDER

[Filed Jan. 19, 1988]

Plaintiff's complaint alleges that defendant FERRIN, an agent for the Federal Bureau of Investigation, caused plaintiff's employment with casino operations to be terminated because of plaintiff's refusal to perjure himself. Plaintiff alleges that such conduct resulted in deprivations of his liberty or property interests without due process of law in violation of the Fifth and Fourteenth Amendments. Defendant has filed a motion to dismiss the complaint asserting qualified immunity. Defendant argues that the constitutional right allegedly violated was not "clearly established" at the time of defendant's actions, as required by *Harlow v. Fitzgerald*, 457 U.S. 800, 812 (1982).

In order to determine if a clearly established right has been violated, the Ninth Circuit examines precedent from the Ninth Circuit and the Supreme Court.

Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986). In the absence of such precedent the court looks to decisions from other courts to determine if the right was clearly established. *Id.*

A suit pursuant to *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), the judicially crafted counterpart to section 1983, enables victims of federal misconduct to sue the individual federal wrongdoers responsible for the violation of their rights. *Bivens* created a remedy for Fourth Amendment violations. In the instant action, plaintiffs allege a violation of Fifth Amendment rights.

In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court recognized a *Bivens* cause of action under the Fifth Amendment. Therefore, defendant's rights to be free from Fifth Amendment infringement as a result of federal misconduct was clearly established under the standard of *Harlow*. Accordingly,

IT IS ORDERED that defendant's motion (#37) is denied.

Dated 15 January 1988.

/s/ Lloyd D. George
LLOYD D. GEORGE
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20154

(2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CASE NO 90-660

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAW OFFICE OF
LAWRENCE J. SEMENZA
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(702) 825-6066

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QUESTION PRESENTED

Whether the Court of Appeals erred by fairly applying well- settled and uniformly recognized law in its fact-specific inquiry into the question of whether qualified immunity is present?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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v.

HERMAN DI MARTINI, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Law Office of Lawrence J. Semenza, on behalf of Herman Di Martini, opposes the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's App. 1a-15a) is reported at 889 F.2d 922. The amended opinion and order of the court of appeal on the denial of rehearing (Petitioner's App. 16a-19a) is reported at 906 F.2d 465. The opinion of the district court (Petitioner's App. 20a-21a) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1245 (1) and governed by Supreme Court Rule 10.

RULE INVOLVED

Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling-

nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last or of a United States court of appeals.
(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

STATEMENT

A.

INTRODUCTION

The sole substantive issue

presented by Petitioner, Lynn J. Ferrin ("Ferrin") is whether the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") erred in determining that no qualified immunity attached to the conduct of Ferrin at issue in the Second Amended Complaint of Respondent, Herman Louis Di Martini ("Di Martini").

The Ninth Circuit applied well-settled law, as uniformly recognized throughout the United States Circuit Courts of Appeal ("courts of appeal") and, in its fact-specific inquiry, fairly determined that no qualified immunity attached to the conduct of Ferrin. As such, the standards for granting a petition for writ of certiorari as enunciated in Supreme Court Rule 10 have not and cannot be met. Supreme Court

Rule 10 requires that a petition for writ of certiorari be granted only when there are "special and important reasons therefor." (emphasis added.) Supreme Court Rule 10.1 (a) and (c) are the subparagraphs applicable to this petition. 10.1 (a) provides that

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

and 10.1 (c) provides that

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

No special or important reasons exist to grant this Petitioner; nor are the character of reasons listed in 10.1 (a) or 10.1 (c) present.

B.

MATERIAL FACTS ARE

GENUINELY AT ISSUE

Ferrin brought a Motion for Summary Judgment on the issue of qualified immunity. The sole focus in determination of that Motion is whether "clearly established" law constitutes a basis for the qualified immunity defense to fail. The following statement of disputed material fact alone, without more,[1] is determinative on the issue of

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[1] In addition, there is a legitimate argument that Ferrin attempted to suborn perjury. This argument, in its simplest form, goes as follows: (1) Di Martini testified before a Grand Jury under oath. (2) Both Di Martini and Ferrin were aware of the content of

"clearly established" law:

Ferrin contacted the employer of Di Martini without legitimate purpose and caused the termination of Di Martini.

C.

APPLICATION OF THE FACTS

TO CLEARLY ESTABLISHED LAW

SUPPORTS A BIVENS CAUSE OF ACTION

The conduct of Ferrin constitutes an unreasonable interference with private employment actionable under "clearly established"law. See Respondent's

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that testimony. (3) Ferrin made strong suggestions that Di Martini change that testimony. (4) Assuming arguendo that the testimony is truthful (which assumption must be made for purposes of the motion for summary judgment as seen in a light most favorable to Di Martini), the conduct of Ferrin is an attempt to suborn perjury. While Di Martini believes that this is a compelling and cogent syllogism, this argument is not necessary to support the denial of Summary Judgment by the Ninth Circuit Court.

Argument, supra, p. 7. The cause of action of Di Martini arises pursuant to Federal common law as delineated in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The factual statements of the declaration of Ferrin in support of the Motion for Summary Judgment and the factual statements of the declaration of Di Martini in Opposition to the Motion for Summary Judgment make clear that material issues of genuine fact are present. Special Agent Ferrin was involved in the FBI's investigation of suspected criminal activity of casinos in Las Vegas, Nevada. Ferrin had interviewed Di Martini while Di Martini was employed at the Stardust Hotel and Casino as part of this investigation.

Declaration of Ferrin App. pp. 1-6. After Di Martini began employment at the Sands Hotel in Las Vegas, Ferrin approached Di Martini while he was on duty and asked to speak to him. Ferrin stated that he wanted the help of Di Martini in the case that was coming up soon against the Stardust Hotel. Ferrin wanted to know what was going on at the Stardust. Ferrin indicated that he knew that Di Martini ran a straight shift at the Stardust and that Ferrin wanted information about what others did there. Di Martini advised Ferrin that Di Martini did not know what Ferrin was talking about. At the conclusion of this conversation, Ferrin advised Di Martini that the FBI was going to get the Stardust if it was the last thing they did and that they would not stop until

they did so. Ferrin further told Di Martini that Ferrin believed that Di Martini did not want to help them. Ferrin advised Di Martini that "we know you have a rich relative back home," after having previously indicated that Ferrin would "see someone" (presumably the casino manager) if Di Martini would not talk with him. Declaration of Di Martini App. pp. 7-11. Eight days later Di Martini was discharged from the Sands Hotel by casino manager, Mr. DuCharme. Mr. DuCharme refused to give a reason for the termination but confirmed that Ferrin had met with Mr. DuCharme after the interview noted above and that Ferrin also went higher in the Sands organization. Mr. DuCharme and Di Martini agreed that they both knew the reason Di Martini was being terminated.

Declaration of Di Martini App. pp. 7-11.

This evidence, viewed in a light most favorable to Di Martini, leads to the ineluctable conclusion that a genuine issue of material fact exists. See Respondent's Argument, supra p. 12.

The Ninth Circuit denied the Motion for Summary Judgment because of the presence of genuine issues of fact as viewed in a light most favorable to Di Martini. The Ninth Circuit applied settled and uniformly recognized law to a unique set of facts to properly find a genuine dispute as to a material issue of fact.[2]

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[2] There is a clear and important distinction between a motion for summary judgment on the issue of qualified immunity and a motion for summary judgment on the merits after discovery is completed. While the court's inquiry must be fact-specific on the issue of qualified immunity, (see Anderson, supra, p. 7), the available evidence

SUMMARY OF ARGUMENT

A. UNDER THE FACTS PRESENT HERE, THE LAW IS "CLEARLY ESTABLISHED" AND THE QUALIFIED IMMUNITY DEFENSE MUST FAIL.

B. SUMMARY JUDGMENT WILL NOT LIE IF THE EVIDENCE IS SUCH THAT A REASONABLE

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must be weighed on its own terms, not viewed in terms of the amount of evidence that would typically be presented in deciding a motion for summary judgment on the merits after full-blown discovery. The viewing of fact-specific evidence in determining a motion for summary judgment on the issue of qualified immunity should not be confused with the weighing of evidence in determining a motion for summary judgment on the merits after discovery. That the evidence presented on a qualified immunity motion is not the quantity of evidence normally needed to survive a motion for summary judgment after completed discovery is

not determinative of the issue of whether a genuine material factual dispute exists for purposes of determining qualified immunity.

JURY COULD RETURN A VERDICT FOR THE NON-MOVING PARTY.

C. THE DECISION OF THE NINTH CIRCUIT SIMPLY APPLIES WELL- SETTLED, UNIFORMLY RECOGNIZED LAW TO THE PARTICULAR FACTS OF THIS CASE TO FAIRLY CONCLUDE THAT SUMMARY JUDGMENT ON THE ISSUE OF QUALIFIED IMMUNITY SHOULD BE DENIED.

ARGUMENT

A.

THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED

I.

THE APPLICABLE GOVERNING LAW IS SETTLED, CLEAR AND UNIFORMLY RECOGNIZED

In order to show the paucity of Ferrin's arguments, it is necessary to delineate the substantive law relating to Ferrin's motion for summary judgment on

the issue of qualified immunity. The relevant question in regard to the issue of qualified immunity is one which is "objective, albeit fact-specific . . ." Anderson v. Creighton, 483 U.S. 635, 641.

The issue on Ferrin's motion for summary judgment is whether a "reasonable officer could have believed [his conduct] to be lawful, in light of clearly established law . . ." Anderson v. Creighton, 483 U.S. 635, 641 (1987).

Since Ferrin has not claimed (and cannot claim) extraordinary circumstances were present such that he neither knew nor should he have known of the relevant legal standard, then, if "the law was clearly established, the immunity defense must fail." A reasonably competent public official "should know the law governing his conduct." Harlow v.

Fitzgerald, 457 U.S. 800, 819 (1982).

Federal officials have a qualified immunity shielding them from civil damage liability if their actions "could reasonably have been thought to be consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

Qualified immunity protects "all but the plainly incompetent and those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 344-345 (1986) cited with approval in Anderson, 483 U.S. at 638.

The concrete legal test for determining whether qualified immunity attaches is whether the official action has "objective legal reasonableness." Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) cited with approval in Anderson,

483 U.S. at 639.

"The contours of the right must be sufficiently clear that a reasonable official will understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The official action in question need not have been found unlawful on a prior occasion. Mitchell v. Forsyth, 472 U.S. 511, 535 (1985) cited with approval in Anderson, 483 U.S. at 640. The unlawfulness of the official action need only be apparent in light of existing law. See Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citing cases).

The objective inquiry into whether qualified immunity attaches is often termed an inquiry whether "clearly established rights" were violated. The standard enunciated by this Court in

Anderson is settled, clear and uniformly recognized throughout all the courts of appeal.

II.

FERRIN VIOLATED A CLEARLY ESTABLISHED RIGHT OF DI MARTINI

In 1915, this court found that at-will employees have a right to be free from unreasonable governmental interference.

"The fact that employment is at the will of the parties respectfully does not make it one at the will of others." Truax v. Raich, 239 U.S. 33, 38 (1915).

In 1959, this court again found that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference 'comes within the 'liberty' and 'property' concepts of

the Fifth Amendment." (emphasis added.) Greene v. McElroy, 360 U.S. 474, 492 (1959) (citing cases).

The Eighth Circuit in Chernin v. Lyng, 874 F.2d 501 (8th Cir. 1989) expressly mentions a critical and simple distinction in the context of unreasonable governmental inference.

> The difficulty with the USDA's present reliance on cases like Roth is that it confuses the constitutional principal (namely, that the Due Process Clause is not an independent source of substantive rights) with a specific proposition about what those rights are (namely, that employees at-will have no enforceable rights concerning their employment against anybody). The latter proposition misstates both Roth and the common law of employment. While a employee like Chernin may not have any claim to continued employment enforceable against his employer, he does have a right enforceable in law against third parties who unlawfully interfere with the employment relation. 874 F.2d at 504-5.

In Meritt v. Mackey, 827 F.2d 1368

(9th Cir. 1987), a case involving both state and Federal defendants, the Ninth Circuit confuses the unassailable principle mentioned in Chernin as cited above. The Ninth Circuit perpetuates this confusion in its order amending its opinion in this case when it states that the district court will need to determine whether a state law entitlement exists. See Petitioner's App. 19a. Compare the order amending opinion (Petitioner's App. 16a - 19a) with the initial opinion (Petitioner's appendix p. 12a starting with the word "however" second to the last word at the bottom continuing through p. 15a ending with the first full paragraph.)

The plain error doctrine enunciated in Supreme Court Rule 24.1 (a) permits correction of this patent mistake

of law by the Ninth Circuit. Di Martini respectfully requests that Supreme Court Rule 24.1 (a) be utilized to negate the unnecessary requirement imposed by the Ninth Circuit that a state law entitlement be shown.

Without regard to the issue of state law entitlement mentioned above, the notion that the Constitution protects at-will employees from unreasonable governmental interference was established, well-settled and not subject to serious debate when Ferrin contacted the employer of Di Martini. To contact an employer without any legitimate purpose is per se an unreasonable governmental interference. Only the plainly incompetent or those who knowingly violate the law would attempt to gainsay the proposition that freedom

from unreasonable governmental interference in employment is not a clearly established right. We live in a society where unreasonable police intervention in our private lives cannot be suffered.

Official abrogation of a clearly established right is remedied by bringing a Bivens actions, as part of Federal common law, not by resort to a deprivation hearing or any administrative process. While the Ninth Circuit has erroneously added the additional element of proving a state law entitlement, no court of appeals has failed to find an employee's right to be free from unreasonable governmental interference in at-will employment.

The fact-specific analysis performed by the Ninth Circuit is simply

an inquiry whether Ferrin's conduct constitutes an objectively unreasonable interference. Since the evidence filed both supporting and rebutting Ferrin's Motion for Summary Judgment creates a genuine issue of fact concerning whether Ferrin's conduct in contacting the employer of Di Martini served any legitimate purpose, the conclusion of the Ninth Circuit that Ferrin's conduct was objectively unreasonable and unlawful based upon existing law is required by force of entelechy.

B.

WELL-SETTLED AND INDISPUTABLE SUMMARY JUDGMENT STANDARDS REQUIRE THE CONCLUSION REACHED BY THE NINTH CIRCUIT

Summary judgment will not lie if

the dispute of material fact is genuine; "that is if the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

> [I]t is true that the issue of material fact required by Rule 56 (c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in the favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed actual dispute be shown to require a judge or jury to resolve the parties' differing versions of the truth at trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (citing First National Bank of Arizona v. Cities Service, Co., 391 U.S. 253 (1968).

It is axiomatic that for purposes of summary judgment "that inferences to be drawn from the underlying facts . . . must be viewed in the light most

favorable to the party opposing the motion." Matsushita Electrical Industrial, Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) citing United States v. Diebold, Inc., 369 U.S. 644, 655 (1962).

It follows from settled principles in regard to motions for summary judgment that if "the factual context renders respondents' claim implausible - if the claim is one that simply makes no . . . sense - respondents must come forward with more persuasive evidence to support their claim that would otherwise be necessary." Matsushita Electrical Industrial v. Zenith Radio, 475 U. S. 574, 587 (1986). In this case, nothing in the "factual context" renders Di Martini's claims implausible. Therefore, Di Martini need not present any additional evidence. As such, no

"relaxed" standard has been imposed by the Ninth Circuit. The evidence presented by Di Martini, without more, is sufficient, when viewed in a light most favorable to Di Martini, to support the denial of summary judgment.

All inferences must be drawn in favor of Di Martini. Furthermore, only evidence is to be considered. Self serving statements in affidavits constitute mere window dressing. A Federal officials' "subjective beliefs about [his conduct] are irrelevant." Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The affidavits of both Ferrin and Di Martini make clear that a reasonable jury could find that Ferrin's conduct was an unreasonable governmental interference with employment which caused his

termination. Inferences about causation for purposes of denying summary judgment need not be raised by way of direct evidence. Inferences of causation are ones upon which reasonable men can differ and as such summary judgment is inappropriate in that context. See, e.g., Richoux v. Armstrong Cork, Corp., 777 F.2d 296, 297 (5th Cir. 1985).

> To avoid summary judgment, the Plaintiff is not required to 'establish' anything, [it] need merely produce evidence to raise disputed issues of material fact. 777 F.2d at 217.

Ferrin has raised facts that could reasonably support an inference of causation. The discussion with Mr. DuCharme in the context of Ferrin's previous visit with Di Martini is alone sufficient to support that inference. Ferrin's bald assertion that he visited the employer of Di Martini to find out

who recommended Di Martini is not sufficient to prohibit the jury from reasonably determining that Ferrin's contact with the employer of Di Martini was an unreasonable governmental interference that caused his termination.

The Ninth Circuit created no new law in adumbrating the contours of analysis for denying a motion for summary judgment in the fact-specific circumstances of this case. No relaxed standard was used. The Ninth Circuit simply delineates that, given the evidence of the declarations, all available reasonable inferences must be resolved in favor of Di Martini for purposes of Ferrin's motion for summary judgment.[3] The Ninth Circuit creates no

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[3] The wisdom of this decision is apparent if Mr. DuCharme's sworn deposition testimony is considered. Mr.

DuCharme's deposition was taken after Ferrin's motion was decided, in a state court proceeding not subject to the stay herein. Mr. DuCharme, in answering the questions of Mr. Semenza testified as follows:

> Either five, seven, ten days, the time I'm not sure, it was a short time after Mr. Dimartini[sic] was hired, I was visited by FBI agent Lynn Ferrin who asked to speak to me. Q. Did you know Mr. Ferrin prior to that date? A. No, sir. Whereupon seeing the business card I asked him to come into the office.
>
> And I asked him what I could do for him. Whereupon he explained to me or he asked me, he said do you know who you have working down there. And I said down where?
>
> He said, the person you just hired recently, and he mentioned Herman Dimartini[sic].
>
> And I said, well, the audition went pretty well, and all the other checks we try to make on prospective employees went well.
>
> And then Mr. Ferrin came out with words to the

effect that, well, I think you ought to know, I want to give you some information that I believe you ought to know.

I said, all right.

And he proceeded to tell me that Herman was employed at the Stardust. And of course I knew that because I had reviewed the job application.

He went into a few of the goings on at the Stardust at that particular time. Correct me if I'm wrong, I think the State and obviously the FBI were involved in doing, checking credit scams or some kind of scams over there.

And that Mr. Ferrin said that although we are pretty sure that Herman was not involved in any wrong doings, that more than likely he had knowledge of wrongdoing and wasn't cooperating with the FBI investigation.

Q. Did Mr. Ferrin indicate to you how Mr. Dimartini[sic] was not cooperating with their investigation, the manner?

A. He either intimated or specifically told me

and I'm sorry, I don't remember which, that they believe he observed certain transactions, and even though he wasn't involved he saw what was going on and knew who was involved and would not, would not . . .

Q. Provide them with information?

A. Thank you. I was going to say, somebody help me.

Mr. Ferrin also made one other statement that caused me some concern and that was that again words to the effect that Mr. Dimartini's[sic] wife was the daughter of I believe a gentlemen by the name of Joseph Aiuppa, excuse me, daughter, cousin, something to that effect.

Q. A relative, close relative?

A. Thank you. And that it was sort of a, you know, I thought you ought to know.

So whereupon I asked him, who is Joseph Aiuppa?

Q. Did Mr. Ferrin explain to you who he believed Mr. Aiuppa was?

new law.

The evidence presented by declaration, without more, shows that a genuine issue of material fact is present on the issues of both whether Ferrin had any legitimate reason to contact the employer of Di Martini and whether Ferrin caused the termination of Di Martini. The standards applied by the Ninth Circuit are wholly consistent with well-

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> A. Words to the effect that Mr. Aiuppa's allegedly one of the hierarchy of the Chicago mob.
> Q. What else occurred at the meeting?
> A. That was it. To the best of my recollection that was it.

The pages of Mr. Ducharme's deposition are attached as App. pp. 12-18.

settled and existing law in regard to summary judgment.

C.

THE RECORD AMPLY SUPPORTS THE CONCLUSION OF THE NINTH CIRCUIT THAT FERRIN VIOLATED A CLEARLY ESTABLISHED RIGHT BASED ON APPLICATION OF EXISTING, CLEAR LAW TO THE UNIQUE FACTS OF THIS CASE

All courts analyze qualified immunity consistently. The issue is that of a "clearly established" right. That other cases applying the same standard have reached different results in analyzing and discussing different fact-specific circumstances does not support Ferrin's proffered argument that the Ninth Circuit has created new law or has caused a lack of uniformity among the

courts of appeal.

There is a clear inference that Ferrin had simply no legitimate interest in contacting the employer of Di Martini. The employer of Di Martini was not involved in the investigation of another casino. Ferrin's statement by declaration, that he contacted the employer of Di Martini to "ask who recommended" Di Martini, is pretextual. This subterfuge, as a matter of law, does not rise to the level of a legitimate basis for furthering an investigation into the illegal activities of another casino sufficient to support summary judgment. For purposes of the motion for summary judgment, the Ninth Circuit, after a fact-specific, objective analysis, correctly concluded that Ferrin's conduct is in violation of a

clearly established law inasmuch as it is unreasonable governmental interference. The Ninth Circuit analysis does not rely upon any relaxed standard but simply relies upon a time-honored standards that are normally applied in the context of summary judgment. The affidavits of Di Martini and Ferrin viewed in a light favorable to Di Martini do not support any claim that Ferrin's interference is reasonable. Since, for purposes of summary judgment, unreasonable interference is fairly debatable, Di Martini must prevail. Other cases, applying the same governing law to functionally different fact specific situations and thereby requiring different analysis and discussion, simply cannot support Ferrin's argument that the Ninth Circuit has created new law or that

there is some inconsistency among the courts of appeal.

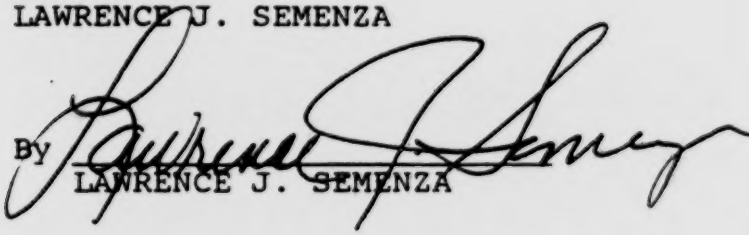
CONCLUSION

Since there are no special or important reasons for granting the petition for a writ of certiorari, since the Ninth Circuit has not rendered a decision in conflict with a decision of another court of appeals on the same matter, since the Ninth Circuit has not departed from the accepted and usual course of judicial proceedings or sanctioned such departure by a lower court, and since the Ninth Circuit has

not decided a question of Federal law which has not been settled by this court, the petition for writ of certiorari must be denied.

Respectfully submitted,

LAW OFFICES OF
LAWRENCE J. SEMENZA

By 
LAWRENCE J. SEMENZA

FEBRUARY 1991.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CASE NO 90-660

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI, RESPONDENT

RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

HERMAN LOUIS DI MARTINI,	)	CV-S-85-001-LDG
Plaintiff,	)	
v.	)	
LYNN JAY FERRIN, Special Agent, FEDERAL BUREAU OF INVESTIGATION,	)	
Defendant.	)	

DECLARATION OF SPECIAL AGENT
LYNN JAY FERRIN

I, Lynn Jay Ferrin, declare under penalty of perjury that the following is true and correct to the best of my knowledge.

1. I am presently employed as a Special Agent (SA) with the Federal Bureau of Investigation (FBI). I am presently assigned to a squad of SAs which investigates organized crime

violations of Federal law. I have been employed as a SA for more than 13 years.

2. In connection with my duties as a SA, I was assigned in 1980 to an investigation of alleged criminal activity at various casinos in Las Vegas, Nevada. One of the casinos under investigation was the Stardust Hotel and Casino.

3. While conducting the investigation at the Stardust Hotel and Casino, I became aware that the plaintiff, Herman Louis Di Martini, was employed at the Stardust Hotel and Casino in the Baccarat card room. Because the investigation indicated that Mr. Di Martini had knowledge concerning the alleged criminal activity occurring at the Stardust Hotel and Casino, he was subpoenaed to testify before a Federal Grand Jury that was

hearing testimony about the case.

4. In January 1984, an indictment was returned against Trans-Sterling, Inc., alleging that between May 1979 and 1981, millions of dollars have been "skimmed out" of the Stardust Hotel and Casino.

5. In November 1984, I learned that Mr. Di Martini was employed in the Baccarat pit of the Sands Hotel in Las Vegas, Nevada.

6. On November 19, 1984, while in the Sands Hotel and Casino, I interviewed Mr. Di Martini while he was taking a break from his employment activities in the Baccarat pit at the Sands Hotel in Las Vegas, Nevada.

7. I questioned Mr. Di Martini about his knowledge of "skimming" activities at the Stardust Hotel and Casino, and specifically, the alleged skimming

activities of various individuals who have been indicted in connection with those activities. When Mr. Di Martini professed no knowledge of the skimming activities, I told him that it was my opinion that he did have such knowledge, and it would be of some assistance in the prosecution of the case against the indicated individuals. When Mr. Di Martini once again denied having any such knowledge, I immediately terminated the interview with him.

8. At no time during the interview did I threaten, harass, or intimated Mr. Di Martini into cooperating in the investigation. At no time did I ask him to perjure himself or change any previously sworn testimony he had given to the Grand Jury.

9. After, I interviewed Mr. Di

Martini, I contacted Mr. Doug Ducharme, the Casino manager at the Sands Hotel to ask him who had recommended Mr. Di Martini be hired by the Sands Hotel. Mr Ducharme advised me that Mr. Di Martini had been recommended for hiring by the Sands' Baccarat pit manager. Mr. Ducharme asked me if Mr. Di Martini was in any trouble, and I advised him that although Mr. Di Martini was not personally involved in the "skimming" activities at the Stardust Hotel and Casino while he was employed there, it was believed that he had information which would assist the FBI in its investigation of such activities. I then concluded the interview with Mr. Ducharme.

10. At no time did I request that Mr. Ducharme terminate Mr. Di Martini from

employment with the Sands Hotel. At no time did I ever ask any other management personnel from the Sands Hotel, the Stardust Hotel and Casino, or any other casino or hotel to terminate Mr. Di Martini from employment with those businesses, respectively. I have never made any threats or demands to any hotels or casinos to either terminate Mr. Di Martini or refuse to hire him. I have not prevented him in any way from gaining employment with any casinos or hotels in the Las Vegas area.

I declare under penalty that the foregoing is true and correct, to the best of my knowledge.

Executed this 18th day of May, 1987.

/S/

LYNN JAY FERRIN
Special Agent
Federal Bureau of Investigation
Las Vegas, Nevada

LAW OFFICES OF
LAWRENCE J. SEMENZA
560 E. Plumb Lane
P. O. Box 11125
Reno, NV 89510

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

HERMAN LOUIS DI MARTINI,	)	CV-S-85-001-LDG
Plaintiff,	)	
v.	)	DECLARATION OF HERMAN LOUIS DI MARTINI
LYNN JAY FERRIN, Special Agent, FEDERAL BUREAU OF INVESTIGATION,	)	
Defendant.	)	

I, HERMAN LOUIS DI MARTINI, declare under penalty of perjury that the following is true and correct to the best of my knowledge.

1. I began employment with the Sands Hotel on November 14, 1984. On November 19, 1984, a man approached the Baccarat table and advised me he would like to

talk to me. I asked him to sit down but he wanted to go elsewhere to talk and I was unable to leave the table until I had a break. I advised him it would be about five minutes before I had a break.

2. The individual who wanted to talk with me gave his business card to Mr. Berry who was one of my supervisors. When I left the able for a break, Mr. Berry handed me the business card which identified LYNN FERRIN as an FBI agent. At that time I remembered MR. FERRIN from his frequenting the Stardust Hotel when I worked there.

3. On my break I spoke with MR. FERRIN. He indicated he wanted to talk to me and that if I didn't talk with him he would go see "someone." I assumed he meant the casino manager. MR. FERRIN stated that he would like my help in the

case that was coming up soon against the Stardust Hotel. He stated he wanted to know what was going on at the Stardust. I advised him he did not know what he was talking about. MR. FERRIN told me that he knew that I ran a straight shift at the Stardust but that he wasted information and for me to tell what Sachs and others did there. He wanted me to tell him about a "beef" that I had with Sachs and others. I told him I did not know what he was talking about. He additionally wanted to know shy they fired Willy Williams. I advised him I did not know what he was talking about, that I thought Willie Williams had retired.

4. MR. FERRIN advised at the conclusion of our discussion that the FBI was going to get the individuals at the

Stardust if it is the last thing they do and they will not stop until they do. MR. FERRIN told me that he guessed that I did not want to help them, and he advised me that if I changed my mind I should give him a call. MR. FERRIN also made a gesture with both hands raised up with his fingers rubbing together and said we know you have a rich relative back home.

5. On November 27, 1984, during my regular work shift, Mr. Lazzaro advised me that Mr. DuCharme wanted to see me in his office. Mr. DuCharme is the casino manager.

6. When I went to Mr. DuCharme's office, he said right out that he was terminating my employment at the Sands Hotel. I asked if he would give me a reason and he replied "no" that he was

just terminating my employment. I then asked if it had anything to do with the Stardust Hotel since MR. FERRIN had interviewed a few days prior. Mr. DuCharme said "yes" he knew that Ferrin had interviewed me and that he had also been in to see him and then he went higher in the organization than him.

7. I told Mr. DuCharme that I knew why I was being fired then. Mr. DuCharme said that I knew the reason and he terminated my employment.

I declare under penalty that the foregoing is true and correct to the best of my knowledge.

DATED this 16 day of June, 1987.

/s/
HERMAN LOUIS DI MARTINI

DISTRICT COURT

CLARK COUNTY, NEVADA

HERMAN LOUIS DiMARTINI and RITA DiMARTINI	)	
Plaintiffs,	)	
vs.	)	Case No. A245524
HUGHES PROPERTIES, INC., licensee dba SANDS HOTEL & CASINO	)	
Defendants.	)	

DEPOSITION OF DOUGLAS DU CHARME
Taken on Tuesday, September 8, 1987
At 1:30 o'clock p.m.
At 411 East Bonneville Avenue
Las Vegas, Nevada

Reported by: Barbara Shavalier, C.S.R. #84

definition. But probationary discharge is--probation period is designed to take a look at he employee, see how they blend in with the other employees, with the supervisors, take a look at their customer relations, all the things you can't see on an audition.

Q. And do I take it in Mr. Dimartini's case that for some reason in this probationary period of time he did not pass the probationary criteria?

A. I guess you could say that for extenuating circumstances.

Q. Can you describe for me, please, during his probationary time how he did not come up to the standard which your required.

A. Well, let me ask you this: May I start from a particular point and explain to you what happened?

Q. Certainly.

A. Thank you.

Either five, seven, ten days, the time I'm not sure, it was a short time after Mr. Dimartini was hired, I was visited by FBI agent Lynn Ferrin who asked to speak to me.

Q. Did you know Mr. Ferrin prior to that date?

A. No, sir. Whereupon seeing the business card I asked him to come into the office.

And I asked him what I could do for him. Whereupon he explained to me or he asked me, he said do you know who you have working down there. And I said down where?

He said, the person you just hired recently, and he mentioned Herman Dimartini.

And I said, well, the audition went pretty well, and all the other checks we try to make on prospective employees went well.

And then Mr. Ferrin came out with words to the effect that, well, I think you ought to know, I want to give you some information that I believe you ought to know.

I said, all right.

And he proceeded to tell me that Herman was employed at the Stardust. And of course I knew that because I had reviewed the job application.

He went into a few of the goings on at the Stardust at that particular time. Correct me if I'm wrong, I think the State and obviously the FBI were involved in doing, checking credit scams or some kind of scams over there.

And that Mr. Ferrin said that although we are pretty sure that Herman was not involved in any wrong doings, that more than likely he had knowledge of wrongdoing and wasn't cooperating with the FBI investigation.

Q. Did Mr. Ferrin indicate to you how Mr. Dimartini was not cooperating with their investigation, the manner?

A. He either intimated or specifically told me and I'm sorry, I don't remember which, that they believe he observed certain transactions, and even though he wasn't involved he saw what was going on and knew who was involved and would not, would not . . .

Q. Provide them with information?

A. Thank you. I was going to say, somebody help me.

Mr. Ferrin also made one other

statement that caused me some concern and that was that again words to the effect that Mr. Dimartini's wife was the daughter of I believe a gentlemen by the name of Joseph Aiuppa, excuse me, daughter, cousin, something to that effect.

Q. A relative, close relative?

A. Thank you. And that it was sort of a, you know, I thought you ought to know.

So whereupon I asked him, who is Joseph Aiuppa?

Q. Did Mr. Ferrin explain to you who he believed Mr. Aiuppa was?

A. Words to the effect that Mr. Aiuppa's allegedly one of the hierarchy of the Chicago mob.

Q. What else occurred at the meeting?

A. That was it. To the best of my recollection that was it.

After he left the--

Q. Let me stop you.

Where did the meeting take place?

A. My office.

Q. And do you recall the approximate date of the meeting?

A. Fir, six, seven days after we employed Herman.

Q. And was anyone else present besides yourself and Mr. Ferrin?

A. No.

Q. Had you ever spoken with the FBI on a previous occasion while you were employed as the director of gaming operations at the Sands Hotel?

A. Regarding Herman?

(2)

No. 90-660

In the Supreme Court of the United States

OCTOBER TERM, 1990

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-660

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Shortly before we filed the petition in this case, this Court granted certiorari in *Siegert* v. *Gilley*, No. 90-96 (Oct. 15, 1990). Although the issues in the two cases are not identical, both cases involve questions regarding the appropriate standards for pretrial adjudication of qualified immunity claims in *Bivens* actions. The decision in *Siegert* therefore could affect the proper disposition here. Accordingly, our petition urged the Court to grant certiorari and to set this case for oral argument in tandem with *Siegert*. That course is no longer possible, since *Siegert* has been scheduled for oral argument on February 19, 1991. We therefore believe that this petition should be held pending the decision in *Siegert*.

Plenary review may be unnecessary depending on the Court's decision in *Siegert*. If the Court's decision in *Siegert*

bears on the Fed. R. Civ. P. 56 question resolved by the Ninth Circuit in this case, the appropriate course may be to vacate the judgment below and remand this case to the Ninth Circuit for reconsideration in light of the decision. But if this Court does not address the Rule 56 question in *Siegert*, we believe that plenary review of this case would still be warranted. For that reason, this petition should be held pending the decision in *Siegert* and should then be disposed of as appropriate in light of the Court's decision.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

FEBRUARY 1991

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* The Solicitor General is now disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20380